In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 61

RADIO AND TELEVISION BROADCAST TECHNICIANS LOCAL UNION 1264, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL., PETITIONERS

v.

BROADCAST SERVICE OF MOBILE, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

By order of the Court, dated June 1, 1964, the Solicitor General was invited to express the views of the United States with respect to this case. The facts are stated in the petition for certiorari and in the opinion of the Supreme Court of Alabama (Pet. 3-8, 16a-23a), and will be briefly summarized here.

Petitioner ("the Union") and radio station WAIP of Mobile, Alabama, had a collective bargaining agreement covering the station's two radio technicians, only one of whom was a full-time employee. Effective August 1, 1962, the ownership of WAIP was transferred to respondent, which renamed it WSIM. Respondent (hereafter "WSIM"), whose affiliated corporations own three other radio stations in Alabama and Mississippi (see p. 5, *infra*), did not retain all of WAIP's staff, and it replaced both of the technicians with non-union men. The Union then met with the new owners and discussed the rehiring of the full-time technician and the status of its agreement with WAIP. The meetings were unsuccessful from the Union's standpoint, and on August 10, 1962, it commenced peaceful picketing at WSIM's premises.[1] In addition, it began a campaign of personal calls and letters to WSIM's advertisers asking them to limit their dealings to stations with union contracts (Pet. 3-4, 17a).

WSIM thereupon filed a complaint in the Circuit Court of Mobile County asking that the Union's picketing and solicitation of advertisers be enjoined as an illegal boycott under Alabama law and a violation of the State's right-to-work law. In defense the Union challenged the jurisdiction of the State court and maintained that the labor dispute was within the exclusive jurisdiction of the National Labor Relations Board. The trial court issued a temporary

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[1] The picket signs read, "WSIM NON UNION LOCAL 1264 IBEW AFL-CIO" (R. 79).

injunction, but subsequently dissolved the injunction after a full hearing on the ground that its jurisdiction was preempted (Pet. 5, 14a, 15a-16a). On appeal, the Supreme Court of Alabama reversed. It concluded that WSIM's annual volume of business did not meet the minimum jurisdictional requirement announced by the Board (Pet. 16a-23a).

We believe that the decision of the Supreme Court of Alabama was erroneous. In *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244, this Court held that when "it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield." On the evidence in this case, it is reasonably clear (1) that petitioner's activities were within the jurisdiction of the National Labor Relations Board, (2) that its picketing may be subject to the limitations of Section 8(b)(7) of the National Labor Relations Act, and (3) that its appeals to the station's advertisers may be protected by Section 7 of the Act. Accordingly, the petition for a writ of certiorari should be granted and the judgment of the Supreme Court of Alabama reversed on the authority of the *Garmon* case. See *McMahon* v. *Milam Mfg. Co.*, 368 U.S. 7; *Hattiesburg Building and Trades Council* v. *Broome*, No. 669, Oct. Term, 1963, reversed *per curiam*, April 27, 1964.

1. The Board's statutory jurisdiction extends under Section 10(a) of the Act to any unfair labor

practice "affecting commerce" as that term is defined in Section 2(7). However, Section 14(c)(1) of the Act, added in 1959, permits the Board to "decline to assert jurisdiction over any labor dispute * * * where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959." Section 14(c)(2), in turn, provides that, nothing "in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory * * * from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction."

Two principles observed by the Board are applicable to this case. First, under the Board's standards of discretionary jurisdiction, it will assert jurisdiction over an employer operating a radio or television station if his gross receipts are over $100,000 a year. *Raritan Valley Broadcasting Co., Inc.*, 122 NLRB 90. Second, in applying this standard, the Board considers several nominally separate corporations to be a single employer if all, or most, of the following four indicia of identity are present: (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership. *Sakrete of Northern California, Inc.*, 137 NLRB 1220, 1222, affirmed, May 21, 1964,

C.A. 9, No. 18,745, 56 LRRM 2327; Twenty-first Annual Report, National Labor Relations Board (1957), 14-15; *Perfect T.V., Inc.*, 134 NLRB 575.[2]

Considering only such evidence as is not disputed by WSIM, it is clear that all four of the above elements are satisfied here:

Common ownership.—The majority stockholder of WSIM is Charles Holt of Hattiesburg, Mississippi, who is also the majority stockholder of three other radio stations,[3] and the sole owner of a corporation which renders accounting and other managerial services to all four stations. Holt's wife is a stockholder in all four stations, and one Bob Robinson is a minority stockholder in the Mobile, Montgomery, and Hattiesburg operations (Pet. 6).

Common management and centralized control of labor relations.—Credit policies, delinquent accounts,

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[2] The validity of this approach has been sustained in various courts of appeals. In addition to *Sakrete*, see *National Labor Relations Board* v. *Royal Oak Tool & Machine Co.*, 320 F. 2d 77, 80-81 (C.A. 6); *National Labor Relations Board* v. *Jones Sausage Co.*, 257 F. 2d 878, 879-880 (C.A. 4); *National Labor Relations Board* v. *A. K. Allen Co.*, 252 F. 2d 37, 38-40 (C.A. 2). The cases cited by WSIM (Brief in Opposition, 14) merely hold that, on the facts there presented, these criteria were not satisfied. There is no substance to WSIM's contention (Brief in Opposition, 18-19) that the Board's standards are not consistently followed. The cases cited were all decided during a short period when the Board required, in addition to the enumerated four elements, that there be some interchange of employees between the corporations and some uniformity in their labor conditions. Under the Board's present decisions, these factors are no longer required.

[3] These stations are located in Montgomery, Alabama, McComb, Mississippi, and Hattiesburg, Mississippi (Pet. 6).

and major financial matters for all the stations are managed by one Stan Lightsey, who is the treasurer of all five corporations. Holt and Robinson hire the station managers and the national advertising representative,[4] they alone have the authority to negotiate with unions, and they carry on continuing discussions with the station managers on sales policy. All three men visit each station regularly in addition to receiving daily business reports by letter and frequent telephone reports (Pet. 7-8).[5] See *Family Laundry, Inc.*, 121 NLRB 1619; *Alpha Corp.*, 128 NLRB 309.

Interrelation of operations.—The service corporation in Hattiesburg handles each station's payrolls, payment of bills, income tax returns and reports to the Federal Communications Commission. Moreover, all stations announce that they are members of the Holt Broadcasting Service, and employees and radio equipment are occasionally interchanged among the stations (Pet. 7-8). See *Checker Cab Co.*, 141 NLRB 583.

On these facts, the Board would conclude that despite their separate incorporation the four radio stations making up the Holt Broadcasting Service constitute a single employer for purposes of the Board's discretionary jurisdictional rules. Since the gross revenue of the four stations exceeds $100,000

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[4] Only the Mobile and Montgomery stations have a national advertising agent (Pet. 7).

[5] The station managers, however, have day-to-day control of the hiring, firing, and renumeration of their personnel, and of normal purchases (Brief in Opposition, 6-7).

per annum (Pet. 8), the Board would assume jurisdiction over labor disputes involving any of the stations, including WSIM.

2. At the time of the picketing the Union did not represent any of WSIM's employees, and it was alleged that the Union had sought recognition and a contract despite its lack of majority status (Brief in Opposition, 4). Consequently, it seems clear that the picketing here was "arguably subject to" Section 8 (b) (7) of the Act, which regulates recognition picketing. In addition, the appeals made to the station's advertisers appear to be protected concerted activity under the Act since Congress deliberately refrained from prohibiting such conduct in Section 8(b) (4) (B). See *National Labor Relations Board v. Servette*, No. 111, Oct. Term, 1963, decided April 20, 1964; cf. *Jemison Broadcasting Co.*, 135 NLRB 362.

3. Observing that under Alabama law, "every reasonable intendment not contradicted by the face of the pleadings will be made in favor of jurisdiction," the State court concluded that since the Union's plea to the jurisdiction did not specifically allege that WSIM's business exceeded $100,000 per annum, the presumption of jurisdiction was not overcome (Pet. 22a-23a). This procedural rule is inadequate, however, to bar the Union's claim of preemption in this Court. For, irrespective of the precise language of its pleading, the Union contended throughout that the Board had jurisdiction over the business involved and was permitted to introduce evidence to show that the ties among the four stations were such as to constitute them a single employer under the Board's

standards. In these circumstances, it would be wholly unrealistic to conclude that the preemption defense had not been adequately raised in the State courts.

4. The Supreme Court of Alabama did not reach the question whether the State court could assume jurisdiction "on the basis of facts claimed to have been in violation of this state's Right to Work Law" (Pet. 23a). This aspect of the case was fully disposed of by this Court's observation in *Retail Clerks, Local 1625* v. *Schermerhorn*, 375 U.S. 96, 105:

> * * * picketing in order to get an employer to execute an agreement to hire all-union labor in violation of a state union-security statute lies exclusively in the federal domain (*Local Union 429* v. *Farnsworth & Chambers Co.*, 353 U.S. 969, and *Local No. 438* v. *Curry*, 371 U.S. 542), because state power, recognized by § 14(b), begins *only with actual negotiation and execution of the type of agreement described by § 14(b)*. Absent such an agreement, conduct arguably an unfair labor practice would be a matter for the National Labor Relations Board under *Garmon*. [Emphasis in original.]

For the reasons stated we believe that the petition for a writ of certiorari should be granted and the judgment of the Supreme Court of Alabama should be reversed.[6]

Respectfully submitted,

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JULY 1964.

[6] Although the Supreme Court of Alabama expressly noted that it was not deciding the merits of the case (Pet. 23a), we submit that the jurisdictional determination alone qualifies for review by this Court under 28 U.S.C. 1257, as applied in *Construction & General Laborers' Union* v. *Curry*, 371 U.S. 542.

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